ANN BAVENDER*
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VINCENT J. CURTIS, JR.
RICHARD J. ESTEVEZ
PAUL J. FELDMAN*
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RICHARD HILDRETH
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HARRY C. MARTIN
GEORGE PETRUTSAS
LEONARD R. RAISH
JAMES P. RILEY
KATHLEEN VICTORY*
HOWARD M. WEISS

* NOT ADMITTED IN VIRGINIA

FLETCHER, HEALD & HILDRETH, P.L.C.

ATTORNEYS AT LAW

11th FLOOR, 1300 NORTH 17th STREET

ROSSLYN, VIRGINIA 22209-3801

(703) 812-0400

TELECOPIER

(703) 812-0486

INTERNET

office@fhh-telcomlaw.com

FRANK U. FLETCHER
(1939-1985)
ROBERT L. HEALD
(1956-1983)
PAUL D.P. SPEARMAN
(1936-1962)
FRANK ROBERSON
(1936-1961)
RUSSELL ROWELL
(1948-1977)

RETIRED
EDWARD F. KENEHAN

CONSULTANT FOR INTERNATIONAL AND
INTERGOVERNMENTAL AFFAIRS
SHELDON J. KRYS
U. S. AMBASSADOR (ret.)

OF COUNSEL
EDWARD A. CAINE*

WRITER'S NUMBER
(703) 812-

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FEB 7 - 1997

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February 7, 1997

BY HAND DELIVERY
Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, DC 20554

Re: MM Docket No. 94-150
Review of the Commission's Regulations Governing
Attribution of Broadcast and Cable/MDS Interests

Dear Mr. Caton:

Transmitted herewith on behalf of Pappas Stations Partnership, are an original and four copies of its comments in response to the *Further Notice of Proposed Rule Making*, FCC 96-436 (released November 7, 1996), in the above-referenced proceeding.

Should any questions arise concerning this matter, please communicate directly with this office.

Very truly yours,

Andrew S. Kersting
Counsel for Pappas Stations Partnership

Enclosures

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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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FEB 7 - 1997

In the Matter of	)	
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Review of the Commission's	)	MM Docket No. 94-150
Regulations Governing Attribution	)	
of Broadcast and Cable/MDS Interests	)	

To: The Secretary

COMMENTS OF PAPPAS STATIONS PARTNERSHIP

Richard Hildreth, Esquire
Howard M. Weiss, Esquire
Andrew S. Kersting, Esquire
FLETCHER, HEALD & HILDRETH, P.L.C.
1300 North Seventeenth Street
11th Floor
Rosslyn, Virginia 22209
(703) 812-0400

February 7, 1997

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SUMMARY

The attribution rules and policies governing television LMAs the FCC has adopted over the years have served the public interest well. The Commission should embrace the fine regulatory work it has accomplished and continue to follow the rules and related procedures it has established in accordance with its experience. The record in this proceeding provides no basis for abruptly departing from the Commission's firmly-established attribution principles and LMA policies.

For the reasons stated herein, the proposed "equity or debt plus" attribution rule should not be adopted. The proposed rule would greatly restrict the flow of capital to broadcast entities, and have a substantial adverse effect on diversity, competition, and the conversion to DTV. The "equity or debt plus" proposal also is overbroad. There is no support in the record for a bright-line test which would preclude, among other legitimate financial arrangements, mere passive investments.

In the event the Commission elects to adopt its proposed attribution rule, existing financial arrangements should be grandfathered to prevent the grave injustice that would be placed upon those licensees who are forced to restructure their financial arrangements, or in many cases, lose their station at a distress sale price.

Moreover, the Commission should not regard LMAs as attributable media interests absent a material relaxation of its television duopoly rule.

BEFORE THE

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WASHINGTON, D.C. 20554

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	)	
Review of the Commission's	)	MM Docket No. 94-150
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To: The Secretary

COMMENTS OF PAPPAS STATIONS PARTNERSHIP

Pappas Stations Partnership ("Pappas")[1] hereby submits these comments in response to the Commission's *Further Notice of Proposed Rule Making*, FCC 96-436 (released November 7, 1996) ("*Further Notice*"), in the above-captioned proceeding.

I. The Commission Should Not Adopt Its Proposed "Equity or Debt Plus" Attribution Rule.

A. The Proposed Attribution Rule Will Inhibit the Flow of Capital to the Broadcast Industry and Have a Significant Impact Upon the Conversion to Digital Television.

The "equity or debt plus" attribution rule proposed by the Commission would greatly inhibit the flow of capital to broadcast entities by preventing networks and other telecommunications companies from providing financing to such entities. The lack of financing not only may hinder existing broadcast service by precluding stations from enhancing their current technical facilities and/or expanding their programming to provide more news and public affairs programs, but it would

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[1] Pappas Stations Partnership, through affiliated entities, currently is the licensee of seven full-power television stations, two radio stations, two separately-programmed LPTV stations (affiliated with Univision and Fox, respectively), and currently is a party to six LMAs. For ease of reference, the affiliated entities also will be referred to herein as "Pappas."

have a significant impact upon the conversion to digital television ("DTV"), which the Commission has acknowledged will be costly.[2] *Further Notice* at ¶21. Moreover, due to the limited funding currently available for small or marginal broadcasters, the result of such an attribution rule likely will be that stations which currently are facing financial difficulties may go dark. In addition, the lack of available financing is likely to have a disproportionate impact on small and minority-owned businesses which traditionally have greater difficulty obtaining financing. Thus, the Commission's proposed attribution rule would have an adverse effect on diversity and competition in broadcast markets.

B. The Proposed Attribution Rule is Overbroad and is Not Supported by the Record.

In addition to the reasons stated above, the "equity or debt plus" proposal should not be adopted because it sweeps far too broadly. The Commission has proposed its draconian measure merely "on the *assumption* that the degree of contractual rights an investor *may* hold is *typically* related to the level of his investment." *Further Notice* at ¶25 (emphasis added). There is no Commission finding in this proceeding -- nor does the record support one -- that, standing alone, the financial arrangements arousing the Commission's concern have resulted in an unauthorized transfer of control of any broadcast station. Nor is there any record of systemic abuse of financing to exercise influence over broadcast outlets. Therefore, there is no factual basis for the Commission to adopt the presumption that every entity that falls within a specified "triggering category", and which also holds a collective 33% equity and/or debt interest (or any other arbitrarily-specified interest) in a

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[2] Indeed, if the DTV spectrum is to be auctioned, as has been proposed by several members of Congress, it may be difficult, if not altogether infeasible, for many stations in smaller markets to make the conversion to DTV.

particular licensee, either has or will exert attributable influence over that station. The Commission's overly simplistic proposal to adopt a bright-line test for analyzing such arrangements constitutes a *solution chasing a problem that has not been proven to exist.*

As suggested in its *Further Notice* (*see* ¶25), in those cases involving a now nonattributable interest that raise control questions, the Commission should continue to make attribution decisions by reviewing the specific contractual language that governs the financing relationship and other factual elements of the arrangement. If, after conducting such a review, the Commission has questions concerning the proposed transaction, the Commission should follow its existing practice of requesting further information or documents regarding the arrangement, and/or, to the extent it is necessary, require the parties to modify their transaction to satisfy the Commission's concerns. Should this not be sufficient, the Commission may launch a formal inquiry, or in egregious cases, designate for hearing. These mechanisms have worked in the past (*e.g.*, *Speer*) and should not be abandoned in favor of a blunderbuss approach *presuming* abuse. Maintaining the Commission's existing procedures will permit the Commission's staff to review, on a case-by-case basis, those relationships involving a nonattributable interest that present the potential for abuse without inhibiting the flow of financing to the entire broadcast industry. To the extent the Commission believes that networks and/or certain large group owners may be exerting control through nonattributable interests in their affiliates or investments in other stations,[3] the Commission's

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[3] *See Further Notice* at ¶24.

existing rules not only provide a satisfactory means of resolving these cases, but the requisite degree of certainty to parties contemplating entering into such transactions.[4]

Reviewing certain attribution cases on an individual basis potentially may require longer processing time for the Commission's staff. However, the Commission's interest in adopting a bright-line test in an attempt to minimize its regulatory burdens does not outweigh its statutory obligation to regulate the broadcast industry in a manner that serves the public interest. The inherent public interest costs of restricting the flow of capital, especially in light of the anticipated conversion to DTV, are simply too great. Moreover, as the Commission has acknowledged, there is no guarantee that the proposed "equity or debt plus" attribution rule would even cover the very relationships which have aroused the Commission's concerns. *Further Notice* at ¶25. Accordingly, the Commission should continue to follow its existing procedures, rather than adopt a broad regulatory standard that will have a substantial adverse effect on diversity, competition, and the conversion to DTV.

C. The Proposed Attribution Rule Would Prohibit Passive Investors From Holding Nonattributable Interests, Blocking Constructive Funding Arrangements.

Holders of non-voting equity and debt frequently are passive investors who are not involved in the operation of broadcast stations. An example of a passive interest that would be precluded by the proposed "equity or debt plus" attribution rule is Pappas' pending purchase of Stations KHGI-TV, Kearney, and KWNB-TV, Hayes Center, Nebraska.[5]

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[4] *See, e.g., Roy M. Speer*, FCC 96-258 (released June 14, 1996).

[5] Pappas currently is originating the majority of the programming on each of these stations pursuant to an LMA pending the Commission's grant of the assignment application.

The Omaha World-Herald ("Herald"), which owns a daily newspaper in Kearney, will provide 100% of the financing for the purchase of Stations KHGI-TV and KWNB-TV in the form of debt. The Herald has been (and will continue to be) a completely passive investor. It has not attempted to exert *any* control over the broker's operations, programming, or personnel decisions. Nevertheless, this financial arrangement would have been precluded by the proposed attribution rule because the Herald's ownership of another media outlet in Kearney is subject to the Commission's cross-ownership restrictions, and the Herald will hold substantially more than a 33% debt interest in the stations.

As a further example, Harry J. Pappas previously loaned funds in an amount greater than the 33% threshold limit to a close relative and the licensee of a radio station in the Sacramento market which was in financial trouble. Pappas is the licensee of Station KPWB(TV), Sacramento, and was at the time Mr. Pappas provided funding to the radio station. Although the investment has always been completely passive, this loan also would have been precluded by the proposed attribution rule because Pappas fell within the category of a "same-market broadcaster" and Mr. Pappas exceeded the 33% equity/debt threshold limit. The station would not have survived without Mr. Pappas' intervention, and other funding sources were unavailable. Yet, the proposed Commission rule would have ensured the station's demise.

As these real-world examples illustrate, the proposed "equity or debt plus" attribution rule should not be adopted because it is over-inclusive and would preclude mere passive investment which is critical to a broadcast station's survival.

D. If the "Equity or Debt Plus" Proposal is Adopted, Existing Arrangements Should Be Grandfathered.

In the event the Commission elects to adopt its proposed "equity or debt plus" attribution rule retroactively, in those instances where the new rule makes existing financing arrangements impermissible, many broadcasters will be forced to refinance their stations unless their existing financial arrangements are grandfathered. It likely will be difficult, if not impossible, for stations to obtain financing at interest rates comparable to those of their original financing, and some licensees may not be able to refinance their stations at all. This would result in failed stations and others having to be sold at distress sale prices. Neither is in the public interest.

As a matter of fairness, broadcasters and their financing entities have structured their relationships based upon existing FCC precedent providing that non-voting equity interests and debt are not attributable. Thus, it would be inequitable and constitute a grave injustice for the Commission to force these licensees under a new, radically different guideline to somehow restructure their financial arrangements or potentially lose their station. Therefore, to the extent the Commission revises its attribution rules to prohibit existing financing arrangements which were entered into in reliance upon the Commission's longstanding policies, the Commission should grandfather all financial arrangements that were entered into prior to November 5, 1996.

II. LMAs Provide Substantial Public Interest Benefits, and Therefore Should Not Be Regarded as Attributable Media Interests Unless the Commission Substantially Relaxes the Television Duopoly Rule.

Congress has recognized the substantial public interest benefits provided by television LMAs. In enacting the Telecommunications Act of 1996, Congress clearly stated its intent for the FCC not only to grandfather existing LMAs, but continue to permit such agreements in accordance with the Commission's rules. *See* Telecommunications Act of 1996, Section 202(g).

The Commission itself has expressly approved of television LMAs, even where a broker has made substantial capital expenditures in connection with the agreement.[6] In light of Congress' directive and the Commission's decisions expressly approving of television LMAs, the Commission should not suddenly reverse its course and regard LMAs as an attributable media interest without, at the same time, substantially relaxing its television duopoly rule. There are many broadcasters who, in complete reliance on the Commission's decisions approving LMAs, have expended millions of dollars in an effort to construct new stations, improve existing ones, and return dark stations to the air. In order to permit the continuation of the substantial public interest benefits provided by LMAs, as well as provide broadcasters the opportunity to recoup at least a portion of their substantial investments, the Commission must substantially relax its television duopoly rule and grandfather all existing LMAs without limitation.

As Congress found, LMAs provide substantial public interest benefits, including the following:

(i) program diversity by enabling the brokered station to air network programming that otherwise would not be aired within the television market;

(ii) permitting existing stations to remain on the air when they otherwise would go dark;

(iii) enabling start-up stations to go on the air that otherwise would remain unbuilt;

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[6] *See, e.g., WGPR, Inc.*, 10 FCC Rcd 8140, 8143-46 (1995) (Commission found no transfer of control where the broker made capital expenditures totaling approximately $2.3 million in equipment and improvements to the brokered station, and paid the licensee/assignor an annual brokerage fee of $1 million).

(iv) enabling existing stations in poor financial condition, which are operating with deficient technical facilities and marginal programming, to improve their facilities and, in some cases, become economically viable as an independent operation;

(v) promoting efficiencies in operation between the two stations which enables both stations to air more news and public affairs programming than they otherwise would be capable of providing;

(vi) providing the opportunity for the employment of additional station personnel; and

(vii) enabling emerging new networks to gain critically important distribution, particularly in smaller markets.

An example of the substantial public interest benefits that can be provided by an LMA is the impact of Pappas' LMA between Stations KPTM(TV) and KXVO(TV), Omaha, Nebraska.[7] Although a construction permit was issued for KXVO, the station remained unbuilt for many years. Station KPTM entered into an LMA with KXVO which enabled the new start-up station to get on the air in June 1995. The stations air completely separate programming. KPTM is a Fox affiliate and KXVO is affiliated with The WB Television Network ("WB"). Through its affiliation with WB, Station KXVO has brought a fifth national network to the Omaha television market.[8] KXVO uses the KPTM news staff to air local news updates once each evening during prime time.[9] The station also recently aired three one-hour forums during prime time involving Congressional and mayoral candidates, and plans other forums on, for example, local educational issues, in the future.

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[7] Pappas is the licensee of Station KPTM. Omaha is the 75th ranked television market. *Broadcasting & Cable Yearbook 1996*, p. C-240.

[8] The fact that KXVO is a WB affiliate is significant in itself because it has enabled WB to gain an additional broadcast outlet in a top 100 market that it otherwise would not have had without the LMA. As the Commission is well aware, gaining distribution is critical to the survival of a new emerging network such as The WB.

[9] Station KXVO will begin airing its own newscasts within the next year.

Moreover, due to its affiliation with WB, KXVO airs a significant amount of children's and family programming, including FCC-friendly children's programming. The station received a 4 share in the most recent ratings book.[10] In addition to its programming achievements, the efficiencies of operation created through the LMA enabled Station KXVO to become profitable within the first 90 days of going on the air despite the hiring of 12 new employees.[11]

Another example of an LMA providing public interest benefits is the LMA between Station WASV-TV, Asheville, North Carolina, and Station WSPA-TV, Spartanburg, South Carolina. Pappas is the licensee of Station WASV-TV, and is brokering the station's time to WSPA-TV.[12] Pappas returned WASV-TV to the air, but has had to operate the station with far less than maximum facilities. Through the funds provided under the LMA, however, Pappas is in the process of constructing a substantially taller tower that will permit WASV-TV to increase its technical facilities in order that the station will be able to cover a much greater portion of the Greenville-Spartanburg market.[13] WASV-TV has purchased competitive programming and soon will become a WB affiliate.

Furthermore, Pappas presently is airing programming on Station KTVG(TV), Grand Island, Nebraska, pursuant to an LMA with the lciensee of that station. Pappas also has an LMA with

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[10] Nielsen's *DMA Market and Demographic Rank Report*, November, 1996.

[11] If Station KXVO had not been operating pursuant to an LMA, it likely would have taken at least four or five years for the station to become profitable and to broadcast the type of non-entertainment programming described.

[12] The licensee of Station WSPA-TV is prohibited from acquiring WASV-TV by the Commission's current duopoly rule.

[13] The Greenville-Spartanburg-Asheville-Anderson market is the 35th ranked television market. *Broadcasting & Cable Yearbook 1996*, p. C-239.

Station KHGI-TV, Kearney, Nebraska, an ABC affiliate in the same market. Because KTVG-TV is a Fox affiliate, the stations air substantially different programming. Station KTVG has been operating from a 200-foot tower and has been able practically to cover only a portion of Grand Island, functioning essentially as an LPTV outlet. As a result of the LMA, KTVG has applied for a construction permit to move to a substantially taller tower, which will enable the station to provide Fox programming to a wide area in the huge Lincoln market.[14] Moreover, the stations employ separate traffic, operations, and maintenance staffs which has resulted in the hiring of additional employees.

Pappas also is airing programming on Stations KFWU(TV), Fort Bragg, and KTNC(TV), Concord, California, pursuant to separate LMAs. Station KFWU is located in Mendocino County, which is in the northwest corner of the San Francisco DMA. Due to its location, KFWU could not survive as a stand-alone facility, and previously operated as a satellite of Station KRCR-TV, Redding, California. Together, however, the two stations complement each other by covering different geographical areas within the widespread San Francisco DMA. Indeed, this is the only means by which UHF stations such as KFWU and KTNC can compete in large markets against established high-powered VHF facilities. Moreover, through their respective LMAs, KFWU currently is airing ten minutes per day of local Mendocino County news, and KTNC is airing its own locally-produced religious program.

The above examples are merely a small sample of the substantial public interest benefits provided by LMAs. If the Commission were to begin treating LMAs as attributable interests without

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[14] The Lincoln-Hastings-Kearney DMA is the 101st ranked television market. *Broadcasting & Cable Yearbook 1996*, p. C-240.

relaxing its television duopoly rule, it would hinder competition and work a grave injustice upon those broadcasters who have expended substantial sums in reliance upon the Commission's previous position. Therefore, in the event the Commission elects to treat LMAs as attributable interests, it must substantially relax its television duopoly rule and/or create an express exception for LMAs, and grandfather all existing LMAs without limitation.

III. CONCLUSION

The attribution rules and policies governing television LMAs that the FCC has adopted over the years have served the public interest well. There is no evidence of a pattern of abusive *de facto* ownership arrangements warranting broad new restrictions on the funding lifeline for broadcast operators. The Commission should embrace the fine regulatory work it has accomplished and continue to follow the rules and related procedures it has established in accordance with its experience. The record in this proceeding provides no basis for abruptly departing from the Commission's firmly-established attribution and LMA policies.

As demonstrated herein, the proposed "equity or debt plus" attribution rule should not be adopted. The proposed rule would greatly restrict the flow of capital to broadcast entities, and have a substantial adverse effect on diversity, competition, and the conversion to DTV. The "equity or debt plus" proposal also is overbroad. There is no support in the record for a bright-line test which would preclude, among other legitimate financial arrangements, mere passive investments.

Nevertheless, in the event the Commission elects to adopt its proposed attribution rule, existing financial arrangements should be grandfathered to prevent the grave injustice that would be visited upon those licensees who would be forced to restructure their financial arrangements or potentially lose their station.

Moreover, for the reasons stated herein, the Commission should not regard LMAs as attributable media interests absent a relaxation of its television duopoly rule.

Respectfully submitted,

PAPPAS STATIONS PARTNERSHIP

By:________________________________
Richard Hildreth
Howard M. Weiss
Andrew S. Kersting

Their Counsel

Fletcher, Heald & Hildreth, P.L.C.
1300 North Seventeenth Street
11th Floor
Rosslyn, Virginia 22209
(703) 812-0400

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ask7/attrib.com